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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

NANCY DARDARIAN, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

OFFICEMAX NORTH AMERICA, INC., an
Ohio corporation,

Defendant.

Case No. 4:11-cv-00947 YGR

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: June 18, 2013

Time: 2:00 p.m.

Courtroom: 5 – 2nd Floor

Judge: Hon. Yvonne Gonzalez Rogers

NATHAN THOMS, individually and on
behalf of himself and others similarly situated,

Plaintiffs,

v.

OFFICEMAX NORTH AMERICA, INC., an
Ohio corporation; and DOES 2 through 50,
inclusive,

Defendants.

Case No. 4:11-cv-02233 YGR

TABLE OF CONTENTS

1		
2	I.	INTRODUCTION 1
3	II.	PROCEDURAL HISTORY 2
4		A. The Dardarian Action 2
5		B. The Thoms Action..... 2
6		C. Court's Order Relating the Dardarian and Thoms Actions 3
7		D. Settlement Negotiations 3
8	III.	BASIC ELEMENTS OF THE PROPOSED SETTLEMENT 4
9		A. Class Benefits..... 4
10		B. Class Notice..... 5
11		1. In-Store Notice..... 5
12		2. Settlement Website Notice..... 5
13		3. E-mail Notice 5
14		C. Completing Claim Forms 5
15		D. Right to Object 6
16		E. Right to Elect Not to Participate in the Settlement..... 6
17		F. Incentive Payments to Class Representative Dardarian 6
18		G. Payment to Plaintiff Thoms Not Serving as Class Representative 7
19		H. Attorneys' Fees and Costs 7
20		I. Settlement Implementation Costs 7
21	IV.	THE PROPOSED SETTLEMENT IS FAIR AND SHOULD
22		RECEIVE PRELIMINARY APPROVAL 8
23		A. The Proposed Settlement Meets All Criteria Establishing Fairness 8
24		1. Strength of Plaintiffs' Case 8
25		
26		
27		
28		

1	2. The Risk, Expense, Complexity, and Duration of Further	
2	Litigation and the Risk of Maintaining Class Action Status	
	Through Trial.....	11
3	3. The Benefits Offered in Settlement	12
4	4. The Extent of Discovery and Stage at Which Settlement	
5	Is Reached	12
6	5. Experience and Views of Counsel	13
7	6. Presence of Governmental Participants	13
8	7. The Proposed Settlement Resulted from Serious, Informed	
9	and Non-Collusive Arm's-Length Negotiations.....	13
10	V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED	14
11	A. The Settlement Satisfies the Requirements of Rule 23(a)	14
12	1. Numerosity.....	15
13	2. Commonality.....	16
14	3. Typicality	15
15	4. Adequacy	16
16	B. The Settlement Class Should be Certified Under Rule 23(b)(3).....	16
17	1. Common Questions Predominate Over Individual Issues	17
18	2. A Class Action is the Superior Method to Settle	
19	this Controversy	18
20	VI. THE PROPOSED CLASS NOTICE PROGRAM IS APPROPRIATE,	
21	AND CLASS NOTICE SHOULD BE APPROVED	19
22	VII. IF THE SETTLEMENT IS PRELIMINARILY APPROVED, THE	
23	COURT SHOULD SCHEDULE A HEARING ON FINAL	
24	SETTLEMENT APPROVAL.....	20
25	VIII. CONCLUSION.....	20

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No. C-06-5428 MHP, 2007 WL 3225466 (N.D. Cal. Oct. 30, 2007).....	14
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521 U.S. 591(1997).....	17, 18
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339 U.S. 306 (1950).....	19
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361 F.3d 566 (9th Cir. 2004)	19
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955 F.2d 1268 (9th Cir. 1992)	8
<i>Deposit Guar. Nat'l Bank v. Roper,</i>	
445 U.S. 326	18
<i>Detroit v. Grinnell Corp.,</i>	
495 F.2d 448 (2nd. Cir. 1974)	10
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417 U.S. 156 (1974).....	19
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216 F.R.D. 197 (D. Me. 2003).....	20

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2	643 F.2d 195 (5th Cir. 1981)	12
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4	No. 3-92-708, 1993 WL 330595 (D. Minn. June 2, 1993)	13
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6	471 F.3d 977 (9th Cir. 2006)	15
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8	497 F. Supp. 2nd 1166 (S.D. Cal. 2007).....	8, 10
9	<i>In re Indep. Energy Holdings PLC,</i>	
10	No. 00 Civ. 6689 (SAS), 2003 WL 22244676 (S.D.N.Y. Sept. 29, 2003).....	14
11	<i>In re Mego Financial Corp. Sec. Litigation,</i>	
12	213 F.3d [454] [(9th Cir. 2000)]	8
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16	618 F. Supp. 735 (S.D.N.Y. 1985)	14
17	<i>Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,</i>	
18	244 F.3d 1152 (9th Cir. 2001)	17
19	<i>Manchaca v. Chafer,</i>	
20	927 F. Supp. 962 (E.D. Tex. 1996).....	14
21	<i>Mendoza v. Tucson Sch. Dist. No. 1,</i>	
22	623 F.2d 1338 (9th Cir. 1980)	19
23	<i>Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.,</i>	
24	221 F.R.D. 523 (C.D. Cal. 2004).....	13
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4	8 F.3d 1370 (9th Cir. 1993)	8
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(1995-1996 Reg. Sess.) May 15, 1996..... 9

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1 **I. INTRODUCTION**

2 This putative class action was brought by Plaintiffs Nancy Dardarian ("Dardarian") and
 3 Nathan Thoms ("Thoms") on behalf of themselves and all other consumers who made a
 4 consumer credit card purchase at a California OfficeMax North America, Inc. ("OfficeMax" or
 5 "Defendant") retail store between March 1, 2010 and February 22, 2011 and whose ZIP codes
 6 were requested and recorded by an OfficeMax employee. Excluded are persons from whom
 7 OfficeMax requested and recorded a ZIP code for a special purpose incidental, but related to the
 8 consumer credit card transaction, including but not limited to, shipping, delivery, servicing,
 9 installation, special orders, customer loyalty program applications, and OfficeMax-branded
 10 credit card applications.

11 OfficeMax is a retailer that owns and operates stores throughout California. This action
 12 arises from OfficeMax's alleged violation of the Song-Beverly Credit Card Act, codified as
 13 California Civil Code section 1747.08 ("Section 1747.08"), by and through its alleged practice of
 14 requesting and recording personal identification information from its customers using credit
 15 cards at OfficeMax's retail stores in California.

16 OfficeMax denies any claim of wrongdoing and asserts dozens of affirmative and
 17 separate defenses to liability and class certification issues. Foremost, OfficeMax argues that it
 18 did not violate the Song Beverly Credit Card Act or any other laws relating to its alleged
 19 conduct. Further, on February 10, 2011 – the same day as the California Supreme Court's decision
 20 in *Pineda v. William-Sonoma Stores, Inc.* – OfficeMax immediately informed all California stores
 21 to stop requesting ZIP codes at the point-of-sale. Prior thereto, OfficeMax claims to have had relied
 22 on multiple California Appellate Court decisions and a Superior Court decision in a lawsuit in
 23 which it was a party, holding that ZIP code information was not personal identification
 24 information within the meaning of the Song-Beverly Credit Card Act. Moreover, OfficeMax
 25 never sold or reverse engineered the ZIP codes recorded at the point-of-sale.

26 After extensive arms-length negotiations, including a full day mediation session with
 27 Judge David A. Garcia (Ret. San Francisco Superior Court Judge) of JAMS and multiple
 28 settlement conferences with Magistrate Judge Nandor J. Vadas, plaintiffs Nathan Thoms and

1 Nancy Dardarian (collectively, "Plaintiffs") and OfficeMax (collectively, the "Parties") have
 2 entered into a Class Action Settlement Agreement and Release (the "Settlement Agreement," a
 3 true and correct copy of which is filed concurrently and attached to the Declaration of Gene J.
 4 Stonebarger ("Stonebarger Decl.") as **Exhibit '1')**.

5 Plaintiffs' counsel believes that the proposed settlement is fair, reasonable and adequate;
 6 therefore, Dardarian now moves the Court for an order: (1) preliminarily approving the
 7 Settlement Agreement as being fair, reasonable, and adequate; (2) provisionally certifying the
 8 Class under Federal Rule of Civil Procedure 23 for settlement purposes only; (3) preliminarily
 9 approving the form, manner, and content of the Class Notices and Claim Form; (4) appointing
 10 Plaintiff Nancy Dardarian as the Class Representative; (5) appointing the law firms of
 11 Stonebarger Law, APC and Hoffman Libenson Saunders & Barba as counsel for the Class; and
 12 (6) setting the date and time of the Fairness Hearing.

13 **II. PROCEDURAL HISTORY**

14 **A. The Dardarian Action**

15 On or about March 1, 2011, Plaintiff Nancy Dardarian filed a class action complaint in
 16 the United States District Court for the Northern District of California entitled *Nancy Dardarian*
 17 *v. OfficeMax Incorporated*, Case No. 4:11-cv-000947-SBA, alleging violations of the Song-
 18 Beverly Credit Card Act of 1971, California Civil Code section 1747.08, *et seq.* (the "Dardarian
 19 Action").

20 **B. The Thoms Action**

21 On or about March 4, 2011, Plaintiff Nathan Thoms filed a class action complaint in the
 22 Superior Court of the State of California, County of San Francisco entitled *Nathan Thoms v.*
 23 *OfficeMax Incorporated, et al.*, Case No. CGC-11-508828, alleging violations of the Song-
 24 Beverly Credit Card Act of 1971, California Civil Code section 1747.08, *et seq.* (the "Thoms
 25 Action").

26 On May 6, 2011, OfficeMax removed the Thoms Action to the United States District
 27 Court for the Northern District of California, where it was assigned the case number 3:11-cv-
 28 02233-WHA.

1 **C. Court's Order Relating the Dardarian and Thoms Actions**

2 On or about July 27, 2011, the Thoms Action was ordered related to the Dardarian Action
3 and reassigned to the Honorable Sandra Brown Armstrong for all further proceedings. The
4 Dardarian Action and the Thoms Action were consolidated for all purposes as *Nancy Dardarian*
5 *v. OfficeMax North America, Inc.*, Case No. 4:11-cv-00947-SBA. On December 15, 2011,
6 Plaintiffs filed a Consolidated Complaint.

7 On January 18, 2012, the Consolidated Action was reassigned to Judge Yvonne Gonzalez
8 Rogers for all purposes with the Case Number 4:11-cv-00947-YGR (the "Action").

9 **D. Settlement Negotiations**

10 Plaintiffs engaged in formal discovery and analyzed the relevant legal issues with regards
11 to the claims in, and potential defenses to, the Action. Stonebarger Decl. at ¶3. Plaintiffs also
12 considered the uncertainties of trial and the benefits to be obtained under the proposed
13 Settlement Agreement and have considered the costs, risks, and delays associated with the
14 continued prosecution of this time-consuming litigation and the likely appeals of any rulings in
15 favor of either Plaintiffs or Defendant. *Id.* The Parties believe their respective positions in the
16 Action are meritorious. *Id.* However, due to the uncertainties and expense of protracted
17 litigation, Plaintiffs decided it is in the best interest of Plaintiffs and the Class to explore mutual
18 resolution of the Action. *Id.*

19 Accordingly, on February 21, 2012, the Parties participated in an all-day mediation
20 conducted by the Honorable David Garcia (Ret.) of JAMS, an experienced mediator. *Id.* at ¶4.
21 On October 25, 2012, November 30, 2012, and January 30, 2013, the Parties participated in
22 Settlement Conferences before Magistrate Judge Nandor J. Vadas, and on November 14, 2012,
23 December 18, 2012, and January 2, 2013, the Parties participated in telephone conferences
24 before Judge Vadas. *Id.* As a result of these settlement conferences and telephone conferences,
25 the Parties ultimately agreed on the material terms to resolve this Action. The terms of the
26 settlement between the Parties are embodied in the Settlement Agreement. *Id.* at ¶2; Exh. '1'.

27 ///

28 ///

1 **III. BASIC ELEMENTS OF THE PROPOSED SETTLEMENT**

2 **A. Class Benefits**

3 As part of the proposed settlement, \$600,000 in Merchandise Vouchers will be
 4 distributed to potential Class members. Without the necessity of any claims process, OfficeMax
 5 customers who make a purchase in an OfficeMax California retail store will receive a
 6 Merchandise Voucher with a value of five dollars ("\$5 Merchandise Voucher") as set forth in the
 7 Settlement Agreement. Specifically, within five (5) days of the beginning of the OfficeMax
 8 fiscal quarter starting at least seventy-two (72) days after the Court enters Final Order and
 9 Judgment, OfficeMax will begin to distribute one hundred and twenty thousand (120,000) \$5
 10 Merchandise Vouchers, monetary value totaling \$600,000, to customers who make purchases in
 11 OfficeMax California retail stores. *See* Settlement Agreement § 1.12 and § 2.3(b).

12 Additionally, all Class members who submit a valid, timely claim will receive a
 13 Merchandise Voucher with a value of ten dollars ("\$10 Merchandise Voucher"). *See* Settlement
 14 Agreement § 2.3(a).

15 The \$10 Merchandise Vouchers have a 90-day redemption period. The \$5 Merchandise
 16 Vouchers will be valid beginning no later than thirty (30) days after the start of such OfficeMax
 17 fiscal quarter and continuing until the end of the OfficeMax fiscal quarter in which they are
 18 issued. Both the \$10 and \$5 Merchandise Vouchers are transferable with standard terms,
 19 including (i) one Merchandise Voucher may be used per customer per transaction; (ii) the
 20 Merchandise Voucher cannot be combined with any other Merchandise Voucher, coupon, offer,
 21 discount, OfficeMax Customer Perks, and/or Retail Connect pricing; (iii) the Merchandise
 22 Voucher is valid on regular, sale, promotional and/or clearance priced items; (iv) the
 23 Merchandise Voucher is not valid on purchases of gift cards, general-use prepaid cards, phone
 24 cards, Virgin Mobile devices, or U.S. postage stamps; (v) the Merchandise Voucher is not valid
 25 on prior purchases or for credit card payments; (vi) the Merchandise Voucher is void if copied,
 26 sold, purchased, taxed and where prohibited; (vii) the original Merchandise Voucher must be
 27 surrendered at time of purchase; (viii) the Merchandise Voucher is not redeemable for cash and
 28 no cash or credit back; and (ix) the Merchandise Voucher is only redeemable at a California

OfficeMax retail location.

B. Class Notice

The Notice of Class Action Settlement will be provided through the following methods:

1. *In-Store Notice*

Within forty-two (42) days after the Court enters an order granting Preliminary Approval of the Settlement, OfficeMax will post or place, for thirty (30) days, a tear-away written notice (substantially similar to the In-Store Notice attached as Exhibit 'C') at customer service near the point of sale in its California retail stores. *See* Settlement Agreement § 3.2(a).

2. *Settlement Website*

Within fourteen (14) business days after the Court enters an order granting Preliminary Approval of the Settlement, the Settlement Administrator will establish an Internet-based website and post a detailed notice (substantially similar to the Full Notice attached as Exhibit 'D') and the claim form (substantially similar to the Claim Form attached as Exhibit 'A'). *See* Settlement Agreement § 3.2(b).

3. *E-mail Notice*

Within forty-two (42) days after the Court enters an order granting Preliminary Approval of the Settlement, OfficeMax will send electronic mail communications (substantially similar to the E-Mail Notice attached as Exhibit 'B') to all of its MaxPerks members for whom it possesses a valid e-mail address and who engaged in a credit card purchase transaction in one of its California retail stores between March 1, 2010 and February 22, 2011 wherein a five digit ZIP code was recorded. The electronic message will notify the recipient of the proposed settlement and that he or she may be a Class member who is entitled to make a claim. The electronic message will include a link to the Settlement Administrator's settlement website, in plain text format, and will instruct the recipient to copy and paste the link into their web browser to view the full notice and to submit a claim. *See* Settlement Agreement § 3.2(c).

C. Completing Claim Forms

To receive a \$10 Merchandise Voucher, Class members must complete and timely submit a claim form to the Settlement Administrator within forty-five (45) days after the deadline set by

1 the Court for OfficeMax to provide In-Store and E-Mail Notice. Timeliness of a Claim Form
 2 will be determined by the date postmarked by the postal service or other expedited delivery
 3 service, or, if submitted electronically through the Settlement Website, the date the Settlement
 4 Administrator receives the claim form, as evidenced by the transmission receipt. *See Settlement*
 5 *Agreement* § 3.4.

6 **D. Right to Object**

7 Any Class member who wishes to object to the settlement must file a signed, written
 8 objection with the Court and serve copies on Class Counsel and OfficeMax's counsel within the
 9 deadline set by the Court. *See Settlement Agreement* § 3.5.

10 **E. Right to Elect Not to Participate in the Settlement**

11 Class members who wish to request to be excluded from or opt out of the settlement must
 12 submit a written, signed Request for Exclusion to the Settlement Administrator within the
 13 deadline set by the Court. The Request for Exclusion must set forth, among others, the date and
 14 location of any transaction(s) in which the Class member used a consumer credit card to make a
 15 purchase at a California OfficeMax retail store between March 1, 2010 and February 22, 2011.
 16 Each Class member who does not submit a Request for Exclusion will be deemed to participate
 17 in the settlement and all releases provided in the Settlement Agreement. *See Settlement*
 18 *Agreement* § 3.8.

19 **F. Incentive Payments to Class Representative Dardarian**

20 After Dardarian and OfficeMax agreed to the Class benefits, OfficeMax agreed that it
 21 would not object to a request by Dardarian for the Court's approval of an award of an incentive
 22 payment of \$4,500.00 in recognition of the risk to her as the Class representative in commencing
 23 the Action, both financial and otherwise, and the amount of time and effort spent by Dardarian as
 24 the Class representative. *See Settlement Agreement* § 2.5.

25 Accordingly, in the event this Settlement Agreement receives Final Judicial Approval,
 26 OfficeMax will pay an incentive award of \$4,500.00 to proposed Class Representative
 27 Dardarian. *See Settlement Agreement* § 2.5.

28 ///

1 Dardarian will provide further supporting documentation and briefing regarding the
2 agreed upon award for Dardarian's incentive payment in her Motion for an Award of Attorneys'
3 Fees and Costs to Class Counsel and for Incentive Award to the Class Representative.

4 **G. Payment to Plaintiff Thoms Not Serving as Class Representative**

5 In consideration for the General Release of Plaintiff Thoms, OfficeMax agrees to pay
6 \$1,750 to resolve his individual claims. *See* Settlement Agreement § 2.6.

7 **H. Attorneys' Fees and Costs**

8 After Dardarian and OfficeMax reached an agreement as to the Class benefits, the Parties
9 had significant settlement discussions regarding Plaintiffs' request for attorneys' fees and costs,
10 including discussions with Judge Vadas. The Parties eventually agreed that Plaintiffs' counsel
11 can apply for fees and costs subject to a floor of \$200,000 and a ceiling of \$500,000. In this
12 regard, Plaintiffs agreed not to petition the Court for more than \$500,000 in attorneys' fees and
13 costs. OfficeMax, likewise, agreed that it would not object to a request by Plaintiffs for the
14 Court's approval of an award of attorneys' fees and costs in the amount of up to \$200,000.
15 OfficeMax, however, preserved its right to oppose any application for attorneys' fees and costs
16 in excess of \$200,000. *See* Settlement Agreement § 2.4.

17 Accordingly, in the event the Parties' Settlement Agreement receives Final Judicial
18 Approval, OfficeMax will pay proposed Class Counsel's attorneys' fees and costs in the amount
19 ordered by the Court, separate and apart from any benefits to the Class. *Id.*

20 Plaintiffs will provide further supporting documentation and briefing regarding the
21 awards for attorneys' fees and costs in their Motion for an Award of Attorneys' Fees and Costs to
22 Class Counsel and for Incentive Awards to the Class Representatives. Plaintiffs' Motion for
23 attorneys' fees will be filed prior to the deadline for Class members to object to the Settlement
24 Agreement. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010).

25 **I. Settlement Implementation Costs**

26 OfficeMax will bear all reasonable costs of retaining the Settlement Administrator to
27 effectuate the settlement contemplated in the Settlement Agreement and providing Notice to the
28 Class. *See* Settlement Agreement § 2.7.

1 **IV. THE PROPOSED SETTLEMENT IS FAIR AND SHOULD RECEIVE**
 2 **PRELIMINARY APPROVAL**

3 **A. The Proposed Settlement Meets All Criteria Establishing Fairness.**

4 As explained by the court in *In re Immune Response Secs. Litigation*, 497 F. Supp. 2d
 5 1166, 1169-1170 (S.D. Cal. 2007):

6 "Although Rule 23(e) is silent respecting the standard by which a proposed
 7 settlement is to be evaluated, the universally applied standard is whether the
 8 settlement is fundamentally fair, adequate and reasonable.' *Officers for Justice*,
 9 688 F.2d at 625; see also *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375
 10 (9th Cir. 1993). When determining whether approval of a settlement is warranted,
 11 courts consider 'several factors which may include, among others, some or all of
 12 the following: [1] the strength of Plaintiffs' case; [2] the risk, expense,
 13 complexity, and likely duration of further litigation; [3] the risk of maintaining
 14 class action status throughout the trial; [4] the amount offered in settlement; [5]
 15 the extent of discovery completed, and the stage of the proceedings; [6] the
 16 experience and views of counsel; [7] the presence of a governmental participant;
 17 and [8] the reaction of the class members to the proposed settlement.' *Torrise*, 8
 18 F.3d at 1375; see also *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
 19 1998). Further, '[t]o survive appellate review, the district court must show it has
 20 explored comprehensively all [fairness] factors.' *Hanlon*, 150 F.3d at 1026 (citing
 21 *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v.*
 22 *Anderson*, 390 U.S. 414, 434, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968)). Finally, 'the
 23 settlement may not be the product of collusion among the negotiating parties.' [*In*
 24 *re*] *Mego Financial Corp. Sec. Litigation*, 213 F.3d [454] at 458 [(9th Cir. 2000)]
 25 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992))."¹

16 **1. *Strength of Plaintiffs' Case***

17 Plaintiffs assert that OfficeMax violated California Civil Code section 1747.08 in that as
 18 part of processing its customers' consumer credit card transactions at a California OfficeMax
 19 retail store, OfficeMax requested and recorded customers' ZIP codes. California Civil Code
 20 section 1747.08, in its present form, states in relevant part:

21 (a) Except as provided in subdivision (c), no person, firm,
 22 partnership, association, or corporation which accepts credit cards
 23 for the transaction of business shall do either of the following:

24 (2) *Request*, or require as a condition to accepting the credit card
 25 as payment in full or in part for goods or services, *the cardholder*
 26 *to provide personal identification information, which the person,*
 27 *firm, partnership, association, or corporation accepting the credit*
 28 *card writes, causes to be written, or otherwise records upon the*
credit card transaction form or otherwise." Cal. Civ. Code §
 1747.08(a)(2) (emphasis added).

¹ The guidance of Rule 23(e)(2) of the Federal Rules of Civil Procedure on the approval of a class action settlement is that it must be "fair, reasonable, and adequate."

California Civil Code section 1747.08 is part of the Song-Beverly Credit Card Act and was designed to promote consumer protection; the Act imposes fair business practices for the protection of consumers. *Florez v. Linens 'N Things, Inc.*, 108 Cal. App. 4th 447, 450 (2003) (citing *Young v. Bank of Am.*, 141 Cal. App. 3d 108 (1983)). Plaintiffs contend that Section 1747.08 was originally enacted as a response to two principal privacy concerns: first, that with increased use of computer technology, very specific and personal information about a consumer's spending habits was being made available to anyone willing to pay for it; and second, that acts of harassment and violence were being committed by store clerks who obtained customers' phone numbers and addresses. *Id.* at 452; *see also* Off. of Sen. Floor Analyses, 3d Reading Analysis of Assem. Bill No. 1316 (1995-1996 Reg. Sess.) July 18, 1995, p. 3.

Additionally, Plaintiffs contend the statute was intended to keep the customer's credit card number separate and apart from his or her personal information such as address, telephone number, birth date, etc., in order to prevent thieves from obtaining both at the same time (*i.e.*, "dumpster diving") and engaging in credit card fraud, usually over the telephone. Assem. Floor Analysis, 3d Reading of Assem. Bill No. 2533 (1995-1996 Reg. Sess.) May 15, 1996, pp. 1-2. When drafting 1747.08, the Legislature was well aware that anyone with access to a consumer's credit card number and address could access their credit history, open credit in their name, or charge something in their name. Dept. Consumer Affairs, Analysis of Assem. Bill No. 1316 (1995-1996 Reg. Sess.) p. 1.

The California Supreme Court issued its unanimous opinion in *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524 (2011), confirming that ZIP codes are "personal identification information" as defined in section 1747.08. *Pineda*, 51 Cal. 4th at 524. Pursuant to California Civil Code section 1747.08(e), a violator of the statute shall be liable for a civil penalty of up to \$250.00 for the first violation and up to \$1,000.00 for each subsequent violation of the statute. Cal. Civ. Code § 1747.08(e). Although a violator of the statute is subject to a mandatory civil penalty, the amount of the civil penalty to be imposed against a Defendant is discretionary. Civil penalties could be as little as a penny or the "proverbial peppercorn." *See The TJX Companies, Inc. v. Superior Court*, 163 Cal.App.4th 80, 86-87 (2008).

OfficeMax denies any wrongdoing in this case. OfficeMax contends that requests for ZIP codes by its employees, and the customers' subsequent responses, were completely voluntary, and therefore, not unlawful. After the *Pineda* Court held that ZIP code information is personal identification information within the meaning of the Act, OfficeMax immediately instructed all California stores to end requesting and recording ZIP codes at the point-of-sale. OfficeMax contends that it never requested ZIP codes at the point-of-sale in its California retail stores for direct marketing purposes or to sell such information to third parties. OfficeMax has never reverse engineered a customer's name and ZIP code to obtain their full mailing address or telephone number. Rather, OfficeMax requested and recorded ZIP codes to evaluate store locations and for placement of Sunday newspaper pre-print inserts. In addition, OfficeMax claims to have extensive measures implemented to protect customer information.

In determining whether the settlement is fair, the Court has to assess whether the relief offered by the settlement is reasonable, in light of the claims to be released. At this stage, the Court need only to conduct a *prima facie* review of the relief and notice provided by the settlement to determine whether notice should be sent to the settlement class members. *In re Immune Response*, 497 F.Supp.2d at 1172. It is simply "not appropriate for the court to attempt to settle these questions of law and fact: '[T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor [the appellate court] is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.'" *Id.* (citing *Officers of Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982)).

In sum, "the merits of the underlying class claims are not a basis for upsetting the settlement of a class action; the operative word is 'settlement.'" *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1150 (2000). Even "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2nd. Cir. 1974).

Plaintiffs believe that this case is strong in light of the California Supreme Court's unanimous decision in *Pineda* confirming that "requesting and recording a cardholder's ZIP codes, without more, violates the [California] Credit Card Act." *Pineda*, 51 Cal.4th at 527-28. The outcome of this case is uncertain, however, and if OfficeMax was to prevail on its arguments in its Opposition to Dardarian's pending Motion for Class Certification, the Class would obtain little or nothing through litigation. Even if Plaintiffs were to convince the Court to certify the Class after a contested motion for class certification and eventually establish liability at trial, then the amount of the civil penalty to be awarded (somewhere between a penny and \$1,000) would rest within the sound discretion of the trial court. *Id.* at 536. As such, if Plaintiffs and the Class succeed at trial, the amount of the civil penalties to be awarded by the Court is uncertain. OfficeMax maintains that penalties, if any, should be the proverbial peppercorn as OfficeMax claims that it has always sought to comply with the Song-Beverly Credit Card Act, did not use ZIP codes requested and recorded at the point-of-sale to invade the privacy of its customers, and the putative class members did not suffer any injury.

2. The Risk, Expense, Complexity, and Duration of Further Litigation and the Risk of Maintaining Class Action Status Through Trial

The settlement takes into account the risk, expense, and complexity of further litigation. Plaintiffs have retained an expert in the credit card industry and would be required to retain additional experts to conduct forensic analysis of the recording and storage of OfficeMax's customer information, as well as experts to testify to the value of the collected information. Stonebarger Decl. at ¶5.

OfficeMax would vigorously oppose Dardarian's attempt to get a class certified and has retained an expert to defeat certification and the Class claims, and an expert affidavit has already been filed with the Court. *Id.*

Additional time consuming and expensive law and motion proceedings would be necessary to narrow or eliminate the claims and defenses both at the certification stage and the trial stage. The time and expense of further litigation could potentially negatively impact OfficeMax's business operations and would interfere with potential Class members' opportunity

1 to obtain benefits promptly. Accordingly, the settlement at this stage in the litigation benefits the
2 Court, the Parties, and the Class. *Id.*

3 **3. *The Benefits Offered in Settlement***

4 Each Class member is eligible to receive a \$10 and \$5 Merchandise Voucher. Such
5 recovery to the proposed Settlement Class is *without* any risk of the Class not being certified and
6 is without any risk that Plaintiffs will not prevail as to liability and/or in recovering substantial
7 penalties. While the dollar value of the settlement per Class member may be relatively small, it
8 must be remembered that any allegation of alleged harm may be difficult to prove. *See Chavez*
9 *v. Netflix, Inc.*, 162 Cal.App.4th 43, 55 (2008) (Six dollar benefit provided by the settlement -
10 free DVD rentals - directly addresses the harm alleged in the complaint. While the dollar value
11 of the settlement per class member is small, Plaintiffs would have encountered considerable
12 difficulties in trying to prove their amount.).

13 **4. *The Extent of Discovery and Stage at Which Settlement Is Reached***

14 It is *not* the law that a class action cannot be settled until the last particle of discovery has
15 been completed and analyzed. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195,
16 211 (5th Cir. 1981) ("It is true that very little formal discovery was conducted and that there is
17 no voluminous record in the case. However, the lack of such does not compel the conclusion
18 that insufficient discovery was conducted") (emphasis omitted).

19 Through mutual exchange of formal discovery, and depositions of OfficeMax
20 representatives under Rule 30(b)(6), Plaintiffs believe they have discovered both the evidence
21 needed to establish their *prima facie* cases and to address the full range of contentions advanced
22 by OfficeMax. In that process, among other things, OfficeMax provided Plaintiffs with
23 information relating to its policies and practices regarding the collection of personal
24 identification information.. As such, while OfficeMax disagrees with Plaintiffs' assessment of
25 the evidence produced, OfficeMax agrees that counsel for each of the Parties has sufficient
26 information to assess the strengths, weaknesses, and likely expense of taking this case to trial.
27 Stonebarger Decl. at ¶6.
28

1 **5. *Experience and Views of Counsel***

2 Class Counsel has extensive experience litigating consumer class actions and has litigated
3 numerous cases based upon violations of the Song-Beverly Credit Card Act. Stonebarger Decl.
4 at ¶¶10-11, Exh. '2'. Class Counsel has represented millions of consumers in numerous
5 consumer class actions asserting violations of the Song-Beverly Credit Card Act of 1971. *Id.*

6 Based upon Class Counsel's substantial experience, Class Counsel believes the present
7 settlement is in the best interest of the Class members due to the significant recovery to the Class
8 members, without any risk of the Class not being certified and not prevailing as to liability
9 and/or civil penalties. *Id.* at ¶12.

10 **6. *Presence of Governmental Participants***

11 Although there is no governmental entity participating in this matter as of this time, full
12 and complete notice is being provided to all appropriate state and federal authorities. OfficeMax
13 will provide such notice, which will include all appropriate information and documents required
14 by CAFA (28 U.S.C. § 1715(b)) including: (1) all complaints filed in the Action, (2) the
15 proposed Settlement Agreement, and (3) settlement notification to Class members and benefit
16 election procedure. As such, the fact of that notice and the opportunity governmental entities
17 will have to take part in the final approval process weigh in favor of preliminary approval.

18 **7. *The Proposed Settlement Resulted from Serious, Informed and Non-***
19 ***Collusive Arm's-Length Negotiations***

20 The requirement that a settlement be fair is designed to protect against collusion among
21 the parties. *See Hanlon*, 150 F.3d at 1026. Typically, "[t]here is a presumption of fairness when
22 a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is
23 presented for Court approval." *Newberg on Class Actions*, § 11.41 (4th ed. 2007); *see also Nat'l*
24 *Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("Great
25 weight' is accorded to the recommendation of counsel, who are the most closely acquainted with
26 the facts of the underlying litigation."); *In re Employee Benefit Plans Sec. Litig.*, No. 3-92-708,
27 1993 WL 330595, at *5 (D. Minn. June 2, 1993) ("[t]he court is entitled to rely on the judgment
28 of experienced counsel in its evaluation of the merits of a class action settlement").

Here, the Parties engaged the services of Judge Garcia of JAMS and attended multiple settlement conferences before Judge Vadas. Stonebarger Decl. ¶4. Before the mediation and the settlement conferences, Class Counsel exchanged information through formal discovery and obtained information from OfficeMax relating to information necessary to evaluate the potential amount of civil penalties. *Id.* Thus, Plaintiffs and their counsel, who are experienced in prosecuting this type of complex class action, had "a clear view of the strengths and weaknesses" of their cases and were in a strong position to make an informed decision regarding the reasonableness of a potential settlement. *See, e.g., In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985); *see also Manchaca v. Chafer*, 927 F. Supp. 962, 967 (E.D. Tex. 1996).

The fact that the Settlement Agreement was facilitated by an experienced mediator and a Magistrate Judge confirms that it is not collusive. *See, e.g., Adams v. Inter-Con Sec. Sys. Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689 (SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable"). Further, the nature of the subsequent negotiations between the Parties, the experience of counsel in this area, and the fair result reached are all evidence of the arms-length nature of the negotiations that lead to the Settlement Agreement.

V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

A. The Settlement Satisfies the Requirements of Rule 23(a)

Rule 23(a) enumerates four prerequisites for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Plaintiffs believe that each of these requirements is met. OfficeMax stipulates to certification of the Class for settlement purposes only.

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a); *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 664 (C.D.

1 Cal. 2009). Here, the numerosity requirement is readily met because joinder of absent class
 2 members would be exceedingly difficult. OfficeMax estimates that from March 1, 2010 through
 3 February 22, 2011, it requested and recorded approximately 2.6 million ZIP codes. While
 4 OfficeMax disputes whether any given ZIP code capture was a violation of the Song-Beverly
 5 Credit Act, it admits for the limited purposes of settlement that the numerosity requirement is
 6 satisfied. Stonebarger Decl. at ¶7.

7 **2. Commonality**

8 "The existence of shared legal issues with divergent factual predicates is sufficient [to
 9 satisfy commonality], as is a common core of salient facts coupled with disparate legal remedies
 10 within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019; *In re First Alliance Mortg.*
 11 *Co.*, 471 F.3d 977, 990-91 (9th Cir. 2006). The commonality requirement is construed
 12 "permissively." *Hanlon*, 150 F.3d at 1019; *Wiener*, 255 F.R.D. at 664.

13 In this case, there are multiple "common issues" affecting the entire Class and
 14 OfficeMax's liability; mainly, whether OfficeMax's conduct of requesting and recording
 15 customers' ZIP codes from its credit card customers violates California Civil Code section
 16 1747.08. Though the Parties dispute whether any given transaction in fact constitutes a violation
 17 of section 1747.08, the issue is nonetheless common amongst the Class. Stonebarger Decl. at ¶8.

18 **3. Typicality**

19 Rule 23(a)(3) typicality is satisfied where the plaintiffs' claims are "reasonably
 20 coextensive" with absent class members' claims; they need not be "substantially identical;"
 21 *Hanlon*, 150 F.3d at 1020; *see also Wiener*, 255 F.R.D. at 665. The test for typicality "is whether
 22 other members have the same or similar injury, whether the action is based on conduct which is
 23 not unique to the named Plaintiffs, and whether other class members have been injured by the
 24 same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).
 25 Thus, "[t]he purpose of the typicality requirement is to assure that the interest of the named
 26 representative aligns with the interests of the class." *Id.*

27 Dardarian alleges that she was exposed to the same alleged unlawful policy and practice
 28 of OfficeMax. Specifically, Dardarian alleges that OfficeMax requested and recorded her ZIP

code during a consumer credit card purchase transaction which constituted a violation of section 1747.08. Importantly, Dardarian contends she does not allege any claims or facts unique to herself. Thus, the requirement of typicality is satisfied. Stonebarger Decl. at ¶9.

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Adequacy is satisfied where (i) counsel for the class is qualified and competent to prosecute the action vigorously, and (ii) the interests of the proposed class representatives are not antagonistic to the interests of the Class. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020; *Weiner*, 225 F.R.D. at 667.²

Plaintiffs have retained Class Counsel with significant experience in prosecuting large consumer protection class actions. Stonebarger Decl. at ¶¶10-11, Exh. '2'. Likewise, Dardarian is a member of the proposed Class and has the same interests as the Class in maximizing the recovery from OfficeMax. She alleges that OfficeMax requested and recorded her ZIP code during a consumer credit card purchase transaction which constituted a violation of section 1747.08. Additionally, Dardarian contends that she does not allege any claims or facts unique to herself or that conflict with the claims of absent Class members. Thus, Dardarian contends she is an adequate representative.

B. The Settlement Class Should be Certified Under Rule 23(b)(3)

Dardarian and OfficeMax request that the Court, for the purposes of settlement, certify a class of the following individuals under Rule 23(b)(3): "all persons who, between March 1, 2010 and February 22, 2011, used a consumer credit card to make a purchase in an OfficeMax retail store located in California, and whose personal ZIP code was requested and recorded in conjunction with the consumer credit card transactions." Excluded are persons from whom OfficeMax requested and recorded a ZIP code for a special purpose incidental, but related to the consumer credit card transaction, including, but not limited to, shipping, delivery, servicing,

² Rule 23(g)(1) also requires the Court to appoint class counsel. Plaintiffs request the Court appoint the law firms of Stonebarger Law, APC and Hoffman Libenson Saunders & Barba as Class Counsel.

1 installation, special orders, customer loyalty program applications, and OfficeMax-branded
2 credit card applications.

3 Certification under Rule 23(b)(3) is appropriate "whenever the actual interests of the
4 parties can be served best by settling their difference in a single action." *Hanlon*, 150 F.3d at
5 1022 (quoting 7A C.A. Wright, A.R. Miller, & M. Kane, *Federal Practice & Procedure* § 1777
6 (2d ed. 1986)).

7 There are two fundamental conditions to certification under Rule 23(b)(3): (1) questions
8 of law or fact common to the members of the class predominate over any questions affecting
9 only individual members; and (2) a class action is superior to other available methods for the fair
10 and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Local Joint Exec. Bd. of*
11 *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162-63 (9th Cir.
12 2001); *Hanlon*, 150 F.3d at 1022; *Wiener*, 255 F.R.D. at 668. Rule 23(b)(3) encompasses those
13 cases "in which a class action would achieve economies of time, effort, and expense, and
14 promote... uniformity of decision as to persons similarly situated, without sacrificing procedural
15 fairness or bringing about other undesirable results." *Amchem v. Windsor*, 521 U.S. 591, 615
16 (1997) (citations omitted and alterations in original); *Wiener*, 255 F.R.D. at 668.

17 **1. Common Questions Predominate Over Individual Issues**

18 The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently
19 cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "Predominance
20 is a test readily met in certain cases alleging consumer. . . fraud. . . ." *Id.* "When common
21 questions present a significant aspect of the case and they can be resolved for all members of the
22 class in a single adjudication, there is clear justification for handling the dispute on a
23 representative rather than on an individual basis." *Fed Prac. & Proc.*, § 1778; *Gen. Tel. Co. of*
24 *Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting commonality and typicality tend to merge).

25 The predominance requirement is satisfied here. As discussed above, Class members are
26 entitled to the same legal remedies based on the same alleged wrongdoing: exposure to the same
27 alleged policy and practice. The central issue for every claimant is whether OfficeMax requested
28 and recorded customers' ZIP codes in connection with consumer credit card transactions. Under

1 these circumstances, there is sufficient basis to find that the requirements of Rule 23(b)(3) are
2 satisfied. *See Weiner*, 255 F.R.D. at 669; *Hanlon*, 150 F.3d at 1022.

3 **2. A Class Action is the Superior Method to Settle this Controversy**

4 Rule 23(b)(3) sets forth the relevant factors for determining whether a class action is
5 superior to other available methods for the fair and efficient adjudication of the controversy.
6 These factors include: (i) the class members' interest in individually controlling separate actions;
7 (ii) the extent and nature of any litigation concerning the controversy already begun by or against
8 class members; (iii) the desirability or undesirability of concentrating the litigation of the claims
9 in the particular forum; and (iv) the likely difficulties in managing a class action. Fed. R. Civ. P.
10 23(b)(3); *see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-92 (9th Cir. 2001).
11 "[C]onsideration of these factors requires the court to focus on the efficiency and economy
12 elements of the class action so that cases allowed under subdivision (b)(3) are those that can be
13 adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190 (citations
14 omitted); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (finding
15 superiority requirement may be satisfied where granting class certification "will reduce litigation
16 costs and promote greater efficiency").

17 Application of the Rule 23(b)(3) "superiority" factors shows that a class action is the
18 preferred procedure for this Settlement. The amount of potential monetary relief to which an
19 individual class member would be entitled is not large. *Zinser*, 253 F.3d at 1191; *Wiener* 255
20 F.R.D. at 671. It is neither economically feasible, nor judicially efficient, for the hundreds of
21 thousands of Class members to pursue their claims against Defendant on an individual basis.
22 *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Hanlon*, 150 F.3d at 1023;
23 *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971). Additionally, the fact of settlement
24 eliminates any potential difficulties in managing the trial of these actions as class-actions. When
25 "confronted with a request for settlement-only class certification, a district court need not inquire
26 whether the case, if tried, would present intractable management problems . . . for the proposal is
27 that there be no trial." *Amchem*, 521 U.S. at 620.

28 ///

VI. **THE PROPOSED CLASS NOTICE PROGRAM IS APPROPRIATE, AND CLASS NOTICE SHOULD BE APPROVED**

The threshold requirement concerning the sufficiency of class notice is whether the means employed to distribute the notice is reasonably calculated to apprise the class of the pendency of the action, of the proposed settlement, and of the class members' rights to opt out or object. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The mechanics of the notice process are best left to the discretion of the court, subject only to the broad "reasonableness" standards imposed by due process.

In this Circuit, it has long been the case that a notice of settlement will be adjudged satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (citing *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980) (9th Cir. 2004); *Hanlon*, 150 F.3d at 1025 (notice should provide each absent class member with the opportunity to opt-out and individually pursue any remedies that might provide a better opportunity for recovery).

The proposed Class Notice (the Full Notice, the In-Store Notice and the E-mail Notice) meet these standards. See Settlement Agreement, Exhs. 'B'-D' to Exhibit 'I' (collectively, the "Notice"). The Notice is written in simple, straightforward language and includes: (1) basic information about the lawsuit; (2) a description of the benefits provided by the Settlement; (3) an explanation of how Class members can obtain Settlement benefits; (4) an explanation of how Class members can exercise their right to opt-out or object to the Settlement; (5) an explanation that any claims against OfficeMax that could have been litigated in these actions will be released if the Class member does not opt out from the Settlement; (6) the names of Class Counsel and information regarding attorneys' fees and expenses and Dardarian's incentive award; (7) the Final Fairness Hearing date; (8) an explanation of eligibility for appearing at the Final Fairness Hearing; and (9) the Settlement Website where additional information can be obtained. *Id.*

Collectively, the Notice provides Class members with sufficient information to make an informed and intelligent decision about the Settlement. As such, they satisfy the content

requirements of Rule 23. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203 (D. Me. 2003) ("notice must describe fairly, accurately and neutrally the claims and parties in the litigation entitled to participate, including the right to exclude themselves from the class").

Additionally, the proposed dissemination of Notice to Class members satisfies all due process requirements. The Settlement provides that OfficeMax will provide notice to the Class after preliminary approval of the Settlement by the Court. Potential Class members will receive direct Notice via email and/or through conspicuous in-store postings. *See Settlement Agreement* § 3.2. And, the Full Class Notice will be available on the Settlement Website. *Id.* at § 3.2(b). In sum, the contents and dissemination of the proposed Class Notice constitutes the best notice practicable under the circumstances and fully complies with the requirements of Rule 23.

VII. IF THE SETTLEMENT IS PRELIMINARILY APPROVED, THE COURT SHOULD SCHEDULE A HEARING ON FINAL SETTLEMENT APPROVAL

Following notice to the Class members, a fairness hearing is to be held on the proposed settlement. *See Manual for Complex Litigation* section 21.633. It is requested that the Court schedule a hearing on final approval of the settlement to be held approximately 120 days after entry of the Preliminary Approval Order. The hearing on the final settlement approval should be scheduled now so that the date can be disclosed in the class notice. Accordingly, it is requested that this Court schedule a hearing on final approval of the settlement for October 22, 2013, at 2:00 p.m.

VIII. CONCLUSION

Based upon the foregoing, and because the proposed settlement is fair, reasonable, and advantageous to the proposed Class members, Plaintiffs respectfully request that the Court enter an Order:

(1) preliminarily approving the Settlement Agreement as being fair, reasonable, and adequate;

(2) preliminarily approving the form, manner, and content of the Full Notice, In-Store Notice, E-mail Notice, and Claim Form;

(3) setting deadlines to submit Claim Forms, object, opt out, and request to appear at the Final Approval Hearing;

(4) provisionally certifying the Class under Rule 23 of the Federal Rules of Civil Procedure for settlement purposes only;

(5) appointing Plaintiff Nancy Dardarian as the Class representative;

(6) appointing the law firms of Stonebarger Law, APC and Hoffman Libenson Saunders & Barba as Class Counsel;

(7) staying all proceedings in the Action until Final Approval; and

(8) setting the Final Approval Hearing on October 22, 2013 at 2:00 p.m.

A [Proposed] Preliminary Approval Order is attached as Exhibit E to the Settlement Agreement.

Dated: May 10, 2013

STONEBARGER LAW, APC

HOFFMAN LIBENSON SAUNDERS & BARBA

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